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## Recent Illinois Decisions

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## RECENT ILLINOIS DECISIONS

APPEAL AND ERROR—DETERMINATION AND DISPOSITION OF CAUSE—WHETHER, UPON APPEAL, A REVIEWING COURT MUST TREAT THE JUDGMENT AS A UNIT OR MAY REVERSE AS TO ONE PARTY WHILE AFFIRMING AS TO ANOTHER—The question as to whether or not a reviewing court may reverse a judgment as to one but affirm as to another defendant appears to have recurred in the recent case of *Chmielewski v. Marich*.<sup>1</sup> The plaintiff there brought his action under the Dram Shop Act<sup>2</sup> for an assault which took place in a certain tavern. Joined as defendants in the suit were the tavern proprietor, the owners of the premises occupied by the tavern, and the two assailants who became intoxicated there. Although served with process, none of these defendants filed appearance and, in due time, a default judgment was entered against all except one, as to whom no order of disposition was made. Three of the judgment defendants, after term time, filed petitions for relief in the nature of a writ of error *coram nobis*<sup>3</sup> and, upon hearing the default judgment was vacated as to all defendants. On appeal taken by plaintiff to the Appellate Court for the First District,<sup>4</sup> that court, after determining that one of the appellees was a minor who had not previously been represented by a guardian *ad litem*, found that the order vacating the judgment as to him should be affirmed, but could find no adequate basis for the order as to the other appellees.<sup>5</sup> It was then faced with a question as to whether or not it could affirm a judgment order as to one while reversing as to another, which question the court resolved in the affirmative.

Prior to the adoption of the Civil Practice Act,<sup>6</sup> Illinois courts followed the common law practice, which required that a verdict or judgment against several tortfeasors had to be treated as a unit,<sup>7</sup> but Section 92 of the statute was undoubtedly enacted to obviate the binding effect of this common law rule.<sup>8</sup> Since then, Illinois courts have interpreted that section to mean, in effect, that under proper circumstances a reviewing court may affirm the judgment as to some at the same time it reverses as

<sup>1</sup> 350 Ill. App. 379, 113 N. E. (2d) 69 (1953). Leave to appeal has been granted.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 43, § 135.

<sup>3</sup> *Ibid.*, Vol. 2, Ch. 110, § 196.

<sup>4</sup> *Ibid.*, Vol. 2, Ch. 110, § 201, treats an order granting a new trial as being final for purpose of appeal.

<sup>5</sup> These parties had claimed that they should not be held accountable for the failure of their insurance agent, after prompt notice of suit, to undertake the defense in their behalf. The court, on the basis of the holding in *Wagner v. Sulka*, 336 Ill. App. 101, 82 N. E. (2d) 922 (1948), held the negligence of the insurance agent was imputable to the defendants and that they were guilty of a lack of diligence.

<sup>6</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 125 et seq., became effective on January 1, 1934.

<sup>7</sup> *Livak v. Chicago & Erie R. R. Co.*, 299 Ill. 218, 132 N. E. 524 (1921).

<sup>8</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 216.

as to other defendants.<sup>9</sup> It must be kept in mind, however, that this power not to treat the judgment as a unit does not extend to the trial court<sup>10</sup> for there is no authority, under Section 50 of the Civil Practice Act, to permit the setting aside of a part of a unit judgment.<sup>11</sup> While not entirely new, the instant case serves to emphasize the distinctions existing between earlier cases concerning the setting aside of judgments.

APPEAL AND ERROR—RECORD AND PROCEEDINGS NOT IN RECORD—WHETHER OR NOT ERRONEOUS APPROVAL OF A TRIAL COURT ORDER MAY BE CORRECTED BY AMENDMENT IN THE REVIEWING COURT—A rather significant issue pertaining to civil procedure was featured in the recent case of *Kelly v. Winkler*.<sup>1</sup> After twice having had his cause of action in tort dismissed for want of prosecution, plaintiff there was successful in obtaining a default judgment against the defendant. On proceedings in the nature of a writ of error *coram nobis* to vacate this default judgment,<sup>2</sup> the defendant urged that leave should be given to answer inasmuch as defendant, after the prior dismissals, had not been personally served with notice of plaintiff's motions to reinstate the cause. The plaintiff's attorney then endorsed an order sustaining the defendant's motion and granting a new trial with an "O.K. for plaintiff," but appealed from this order to the Appellate Court for the First District.<sup>3</sup> The defendant then summarily moved to dismiss the appeal on the ground the order so approved by plaintiff was a consent order, from which no appeal could be taken. On oral argument on such motion, the plaintiff's attorney insisted that his endorsement of the order was as to form only and that he did not intend to waive the right of appeal. The court, dismissing the appeal, held that, if amendment was necessitated to qualify the approval given to the court order, or to modify the record in that respect, the amendment had to be made in the trial court before the appeal had been taken.

In reaching this conclusion, the court found it necessary to ascertain the effect which should be given to the approval of a trial court order, without qualification as to form or substance, by an endorsement initialed "O.K." by the attorney. It concluded that such an order would amount

<sup>9</sup> *Crane v. Railway Express Agency*, 369 Ill. 110, 15 N. E. (2d) 866 (1938); *Minnis v. Friend*, 360 Ill. 328, 196 N. E. 191 (1935); *Zahn v. Muscarello*, 336 Ill. App. 188, 82 N. E. (2d) 504 (1948).

<sup>10</sup> See *Gray v. First National Bank of Chicago*, 388 Ill. 124, 57 N. E. (2d) 363 (1944); *Fredrich v. Wolf*, 383 Ill. 638, 50 N. E. (2d) 755 (1943).

<sup>11</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 174(7). Contrast the authority there given to set aside "any judgment" with the authority given, in Section 174(1), to issue writs of execution upon "one or more judgments rendered in the same cause."

<sup>1</sup> 351 Ill. App. 145, 114 N. E. (2d) 335 (1953). Leave to appeal has been denied.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 196.

<sup>3</sup> Interlocutory appeals from orders on motions granting new trials are authorized by Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 201.

to a consent judgment.<sup>4</sup> To accomplish that result, it had to discard a policy which it had previously followed, evidenced in the case of *People ex rel. Edelman v. Hunter*,<sup>5</sup> to the effect that the written approval endorsed on a decree, provided the decree was one embracing an actual decision by the trial court, could not be construed to represent an agreement by the parties, hence the right of appeal would be reserved in such cases.<sup>6</sup> The decision in the instant case, in this respect, would make possible a uniform treatment of the problem, and would tend to reduce further ambiguity, even though it formulates a more restrictive rule. Hereafter, one desiring to retain a right to appeal should not give unqualified approval to trial court orders through use of an "O.K." endorsement but should clearly note that the approval is as to form only.

Perhaps more important is the emphasis placed by the court on its refusal to permit amendment of the record in the reviewing court. While Section 92 of the Civil Practice Act purports to authorize a reviewing tribunal to exercise "any and all of the powers of amendment" belonging to trial courts,<sup>7</sup> it has been noted that, certainly as to the several appellate courts, such courts possess appellate jurisdiction only,<sup>8</sup> hence the court appears to have acted correctly in this regard. While the decision may appear to be harsh, it emphasizes the fact that review is to be had on the record as presented. If there is occasion to correct errors or to amend pleadings, such correction must occur in the trial court, before judgment has been rendered and appeal has been taken,<sup>9</sup> at least as long as present constitutional provisions remain in effect.

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—  
WHETHER A PERSON LEAVING VEHICLE FOR TEMPORARY PURPOSE BEFORE  
TRIP IS COMPLETED LOSES STATUS AS GUEST—The case of *Tallios v. Tallios*<sup>1</sup>

<sup>4</sup> It has been uniformly held that, as a true consent judgment represents an independent agreement of the parties and is not really the judgment of the trial court, no appeal may be taken therefrom: *First Nat. Bank of Chicago v. Whitlock*, 327 Ill. App. 127, 63 N. E. (2d) 659 (1945). It has also been held that approval of a court decree, as manifested by an attorney's "O.K.," amounts to a consent judgment: *City of Kankakee v. Lang*, 323 Ill. App. 14, 54 N. E. (2d) 605 (1944).

<sup>5</sup> 350 Ill. App. 75, 111 N. E. (2d) 906 (1953).

<sup>6</sup> See also *McDavid v. Fiscar*, 342 Ill. App. 673, 97 N. E. (2d) 587 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 357.

<sup>7</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 216(1)(a).

<sup>8</sup> *Ibid.*, Vol. 1, Ch. 37, § 32. The case of *Leffers v. Hayes*, 327 Ill. App. 440, 64 N. E. (2d) 768 (1946), appears to have permitted amendment of a complaint, in the reviewing court, so as to make the same conform to the proofs, but see comment thereon in 24 CHICAGO-KENT LAW REVIEW 262.

<sup>9</sup> *Bollaert v. Kankakee Tile & Brick Co.*, 317 Ill. App. 120, 45 N. E. (2d) 506 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 244. See also *Salitan v. Neff Feed Co.*, 351 Ill. App. 127, 114 N. E. (2d) 320 (1953), where a motion to amend the complaint to conform to the proofs was denied in the reviewing tribunal.

<sup>1</sup> 350 Ill. App. 299, 112 N. E. (2d) 723 (1953). Leave to appeal has been denied.

returned to the Illinois Appellate Court<sup>2</sup> but this time the question concerned the correctness of a trial court ruling to the effect that the wife in question was a guest in the employer's truck at the time the injury was sustained.<sup>3</sup> The facts disclosed that the plaintiff had accompanied her husband in a truck owned by the defendant but driven by the husband on certain business errands for the defendant. On the way home, the wife discovered that she did not have her purse and could not readily find it in the truck. After the husband stopped the vehicle, the wife opened the door, backed out of the seat, felt under it for the purse and, while her left foot was on the pavement and her right foot on the running board, the truck suddenly shot forward and knocked her down. The trial court struck all allegations of negligence, ruling as a matter of law that the plaintiff was a guest, and confined the proof to acts of wilful, wanton and malicious character, on which basis the jury found the defendant not guilty. On appeal, plaintiff contended that the Illinois "guest" statute was inapplicable,<sup>4</sup> but the Appellate Court held otherwise notwithstanding the fact that, at the time, the plaintiff was not in the cab of the truck.

As no prior Illinois case had produced a construction of the statute in relation to analogous facts, the court was forced to rest its decision upon what it considered the legislative intention to be. Adopting a liberal interpretation for the phrase "riding in a motor vehicle," it declared that the relation of host and guest begins when the guest attempts to enter the auto and ends only when he has alighted at the end of the ride. This relation, the court said, is not interrupted by any usual and customary acts performed as an incident to the normal courtesy shown to a guest. It might be noted, however, that the court made no reference to the Wisconsin case of *Rohr v. Employers Liability Assurance Corporation, Ltd.*,<sup>5</sup> which dealt with the application of the same Illinois statute to a somewhat similar fact situation. The driver and the plaintiff there concerned were driving along an Illinois highway when a tire went flat. Both got out of the car. The driver began working a bumper jack while the plaintiff stood alongside. The jack slipped off the bumper and the car suddenly rolled backward and struck the plaintiff. With no discussion of the problem and with the apparent acquiescence of the defendant, the court concluded that the plaintiff was not a guest because he was not riding "in" the car when injured.<sup>6</sup> The case is probably one of doubtful persuasion, but the con-

<sup>2</sup> A prior appeal, noted at 345 Ill. App. 387, 103 N. E. (2d) 507 (1952), had decided that a wife could sue her husband's employer for a negligent tort committed by the husband-servant.

<sup>3</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 58a, restricts the cause of action of a "person *riding in a motor vehicle as a guest*" to acts of wilful and wanton misconduct on the part of the driver. Italics added.

<sup>4</sup> In the absence of a statute, the common law would have imposed liability on the defendant for the negligence of the driver: *Denton v. Midwest Dairy Products Corp.*, 284 Ill. App. 279, 1 N. E. (2d) 807 (1936).

<sup>5</sup> 243 Wis. 113, 9 N. W. (2d) 627 (1943).

<sup>6</sup> See also note on the case of *Vest v. Kramer*, 158 Ohio St. 78, 107 N. E. (2d) 105 (1952), in 31 CHICAGO-KENT LAW REVIEW 151, particularly p. 152, note 3.

duct of stopping to fix a flat tire could easily come within the broad definition given in the language used in the instant case.

To further bolster its conclusion, the Illinois court also stated that the beginning and end of the host-guest relationship was not unlike the beginning and end of the relationship between a carrier and a passenger for hire in a public conveyance, wherein it has been held that the relationship would not be interrupted by a temporary absence from the conveyance for a reasonable and useful purpose. Again, it is interesting to note that the Ohio case of *Eshelman v. Wilson*<sup>7</sup> rejected an attempt to apply this same rule to an automobile guest situation, the court there saying that the extension of the relationship of a passenger to a zone beyond the common carrier itself had been brought about because of the fact of payment by the passenger for his transportation. While there is a degree of variance in the wording of the several "guest" statutes, so as to make a decision in one jurisdiction of little value as precedent in another,<sup>8</sup> these two cases offer enough to generate a question as to whether the court concerned with the instant case correctly ascertained the legislative intention.

COURTS—CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY—WHETHER CUSTODIAL JURISDICTION OF DIVORCE COURT OVER MINOR IS AFFECTED BY ASSUMPTION OF JURISDICTION BY JUVENILE COURT—In the recent case of *People ex rel. Houghland v. Leonard*,<sup>1</sup> the Illinois Supreme Court was confronted with an original petition for habeas corpus prosecuted by the mother on behalf of a minor who was held in custody by the superintendent of the Illinois Training School for Boys under a warrant of commitment issued by an appropriate Illinois county court pursuant to proceedings based on the Juvenile Court Act.<sup>2</sup> By virtue thereof, rights to custody and guardianship, previously awarded to petitioner under a divorce decree rendered by a competent Illinois circuit court, were nullified. Petitioner claimed, among other things, that the continuing jurisdiction of the circuit court over the minor's custody, incident to the divorce decree,<sup>3</sup> precluded a subsequent assumption of jurisdiction by a county court, but the Supreme Court dismissed the petition, and remanded the minor to the custody of the superintendent, when it held that the prior

<sup>7</sup> 83 Ohio App. 395, 80 N. E. (2d) 803 (1948). The defendant there had transported plaintiff to a social gathering. Before beginning the return trip, plaintiff entered the automobile but alighted when the defendant could not find his keys. Plaintiff was standing about two feet from the car when it suddenly moved and struck him. Held: the plaintiff was not "in or upon said motor vehicle," hence not under the Ohio guest statute.

<sup>8</sup> Compare the holdings in *Castle v. McKeown*, 327 Mich. 518, 42 N. W. (2d) 733 (1950); *Eshelman v. Wilson*, 83 Ohio App. 395, 80 N. E. (2d) 803 (1948); and *Prager v. Isreal*, 15 Cal. (2d) 89, 98 P. (2d) 729 (1940).

<sup>1</sup> 415 Ill. 135, 112 N. E. (2d) 697 (1953).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 190 et seq.

<sup>3</sup> *Ibid.*, Vol. 1, Ch. 40, § 19.

and continuing jurisdiction of the circuit court, stemming from the original divorce decree, did not operate to prevent the county court from also assuming jurisdiction over the minor under delinquency proceedings.

The Supreme Court, in arriving at this conclusion, recognized that the problem presented was one of first impression in Illinois, although it inferentially recognized the general rule to be that, when two courts have concurrent jurisdiction to enforce the same right between the same parties, once jurisdiction of one court has attached, the other court would be without right to proceed to the same end.<sup>4</sup> Nevertheless, the court appears to have adopted the position it did on the ground that such principle was inapplicable in the instant case principally because the doctrine applies with respect to the enforcement of the same right whereas the right sought to be enforced by the juvenile court was not precisely the same as the one previously considered by the divorce court. In that connection, the court noted that proceedings before the juvenile court may be initiated on behalf of the public generally<sup>5</sup> in the interest of the right of the state, as *parens patriae*, to prevent the delinquency and destitution of its children as a class,<sup>6</sup> whereas the divorce court exercises its jurisdiction to enforce the full measure of the duty owed by the parent in the maintenance, support, and education of the particular child.

While no criticism can be addressed to either the reasoning followed or the result attained, the decision, in adhering to the majority view on the point,<sup>7</sup> has apparently nullified earlier Illinois decisions which, in full accord with the minority view,<sup>8</sup> have intimated that any modification of custody arrangements ought to come from the court wherein the earlier decree was rendered.<sup>9</sup> The decision, in that respect, may also be said to be a step in the direction of integrating the policy and purposes revealed in the new Youth Commission Act recently adopted in this state.<sup>10</sup>

EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION—WHETHER STATE HAS RIGHT TO JURY TRIAL IN EMINENT DOMAIN PROCEEDINGS—In the recent case of *Department of Public Works*

<sup>4</sup> *Aquellino v. City of Waukegan*, 344 Ill. App. 204, 100 N. E. (2d) 820 (1951).

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 193, indicates that any "reputable person, being a resident of the county," may initiate proceedings based thereon.

<sup>6</sup> The case of *Lindsay v. Lindsay*, 257 Ill. 323, 100 N. E. 892 (1913), contains an excellent discussion of the purposes underlying the statute.

<sup>7</sup> See annotation in 78 A. L. R. 317.

<sup>8</sup> *State ex rel. Emory v. Porterfield*, 211 Mo. App. 499, 244 S. W. 966 (1922), sets out the minority position on the point.

<sup>9</sup> See, for example, *People ex rel. Hanawalt v. Small*, 237 Ill. 169, 86 N. E. 733 (1908); *People ex rel. Burr v. Fahey*, 230 Ill. App. 143 (1923).

<sup>10</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 220d.1 et seq. Section 2 thereof describes the general purpose to be one designed "to conserve the human resources represented by the youth of the State . . . by providing methods of training . . . [for] young persons found delinquent or guilty of crime. . . ." Section 9 directs the newly-created Youth Commission to receive persons committed to it pursuant to Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 190 et seq., being the statute involved in the instant case.

*and Buildings v. Kirkendall*,<sup>1</sup> the state agency, acting under the authority of the Illinois Freeways Act,<sup>2</sup> sought to condemn certain premises for an improvement on a state road. One of the defendants filed an answer to which was attached a lease.<sup>3</sup> Petitioner's motion to strike the answer and the lease, and another motion for ascertainment of compensation by a jury, were denied. The trial court, after hearing the evidence without a jury, ascertained compensation in the defendant's favor. On direct appeal by petitioner,<sup>4</sup> the Illinois Supreme Court held that the denial of jury trial did not constitute an abuse of judicial discretion inasmuch as the state constitution did not guarantee to the state a right to jury trial in such cases.

The law is well settled that the constitutional right to a jury trial does not necessarily extend to proceedings based upon an exercise of the right of eminent domain.<sup>5</sup> Two basic reasons support this principle. One, at common law, eminent domain proceedings were not encompassed within the term "common law actions," hence did not fall within the area in which the constitutional guarantee as to jury trial operates.<sup>6</sup> Second, it early became quite common practice to fix the compensation to be paid for property taken through the use of other agencies than the common-law jury.<sup>7</sup> Prior theory and practice appears to have been well known to the framers of the present Illinois constitution when, in 1870, they provided that, whenever private property was taken for public use, the compensation to be paid should be ascertained by a jury.<sup>8</sup> They did, however, include a brief exception with respect to those cases wherein compensation was to be made by the state, and it was this exception which formed the basis for the instant decision.

Cases decided since 1870, wherein eminent domain proceedings have been conducted by lesser organs of the state, have recognized a right to trial by jury if demanded by the property owner<sup>9</sup> and not waived.<sup>10</sup> These cases, however, have left unsettled the question whether, when the

<sup>1</sup> 415 Ill. 214, 112 N. E. (2d) 611 (1953).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 121, § 334 et seq.

<sup>3</sup> The defendant in question had, in good faith, secured a lease prior to the filing of the petition. He urged that this fact should be considered in determining the fair market value of the land. The Supreme Court held that the lease was admissible in evidence, it being material to the question of valuation.

<sup>4</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199.

<sup>5</sup> *Johnson v. Joliet & Chicago R. Co.*, 23 Ill. 124 (1859); *Ross v. Irving*, 14 Ill. 171 (1852).

<sup>6</sup> *United States v. Kenesaw Mountain Battlefield Ass'n*, 99 F. (2d) 830 (1938); *United States v. 204.85 Acres of Land*, 49 F. Supp. 20 (1943); *United States v. Alexander*, 47 F. Supp. 900 (1942).

<sup>7</sup> 18 Am. Jur., *Eminent Domain*, § 337. Historical treatment of the subject is also furnished in the opinion in *Rich v. City of Chicago*, 59 Ill. 286 (1871).

<sup>8</sup> Ill. Const. 1870, Art. II, § 13. The language thereof is substantially repeated in Ill. Rev. Stat. 1953, Vol. 1, Ch. 47, § 1.

<sup>9</sup> *Michigan Cent. R. Co. v. Spring Creek Drainage Dist.*, 215 Ill. 501, 74 N. E. 696 (1905).

<sup>10</sup> *Chicago, M. & St. P. R. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205 (1886).



state itself acted, a jury trial was essential. In view of the holding in *Johnson v. Joliet & Chicago Railroad Company*,<sup>11</sup> to the effect that eminent domain proceedings are neither *ex contractu* nor *ex delicto* in character, and in the absence of any express constitutional or statutory language requiring trial by jury where the state itself seeks to take property,<sup>12</sup> it can only be believed that the holding in the instant case, novel as it may be, is the correct one. It would seem to follow that, when the state sues, the private owner is likewise to be denied a right to trial by jury, much as he may desire to have the services of one. The defect in law would appear to be one which calls for legislative consideration.

INJUNCTIONS—ACTIONS FOR INJUNCTIONS—WHETHER TECHNICAL ACCURACY IN VERIFICATION OF PLEADING IS PREREQUISITE TO INJUNCTIVE RELIEF—In the recent case of *Callahan v. Holsman*,<sup>1</sup> the plaintiff secured a temporary injunction designed to restrain the defendants, holders of a second mortgage trust deed, from foreclosing thereon. A motion to dissolve, made by defendants, having been denied, an appeal was taken to the Appellate Court for the First District.<sup>2</sup> That court reversed when the judges unanimously agreed that the complaint failed to state a *prima facie* case for final relief, but they disagreed over the point as to whether or not the complaint was adequately verified. Following the customary form, plaintiff had attached an affidavit to the complaint to the effect that the facts stated therein were true "except for such facts as are stated on information and belief," and that, as to these, the plaintiff verily believed them to be true. The appellants contended the affidavit was deficient because the words "to be" had been omitted after the word "stated" in the quoted phrase, so it was not possible to determine which facts were absolutely verified and which ones only qualifiedly so. Despite this, the majority of the court treated the affidavit as being sufficient, believing the law to have outgrown that primitive state of formalism wherein the precise word was the sovereign talisman and every slip was fatal.<sup>3</sup>

In reaching the conclusion that the affidavit was sufficient, the court deviated from the strict rule enunciated in the case of *Board of Trade v. Riordan*,<sup>4</sup> where it had been held that the necessary allegations in a bill

<sup>11</sup> 23 Ill. 124 (1859).

<sup>12</sup> See *Department of Public Works and Buildings v. Gorbe*, 409 Ill. 211, 98 N. E. (2d) 730 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 142, which held Ill. Laws 1947, p. 905, unconstitutional. That statute, designed to permit a quick taking of property at the instance of the state, made no provision for jury trial to determine the adequacy of the sum tendered or deposited.

<sup>1</sup> 351 Ill. App. 1, 113 N. E. (2d) 483 (1953). Robson, P. J., specially concurring, agreed that the complaint did not state a *prima facie* case, but refused to concur in the conclusion that the verification of the complaint was adequate.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 202, authorizes an appeal from interlocutory orders concerning injunctions.

<sup>3</sup> This view was expressed by Judge Cardozo in *Wood v. Lady Duff-Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917).

<sup>4</sup> 94 Ill. App. 298 (1900).

for injunction had to be verified positively, and achieved a liberal result in reliance upon the Supreme Court holding in the case of *Hulse v. Nash*,<sup>5</sup> wherein an affidavit qualified "as to matters therein set forth on information and belief" was deemed to be sufficient. The later Supreme Court holding in *Smiley v. Lenane*,<sup>6</sup> an election contest matter, however, seems to have withdrawn from any departure from the highly technical principle advanced in previous decisions, wherein affidavits had been criticized on the ground that a prosecution for perjury could not be assigned on them,<sup>7</sup> for the court there re-emphasized the perjury element.

On this last point, the Appellate Court concerned with the instant case spoke lightly of the perjury aspect by referring to the fact that no member of the court had ever heard of a perjury prosecution based upon an affidavit attached to a civil complaint of the kind before it. While this might be so, it had been held, in *Wright v. Depositors State Bank*,<sup>8</sup> that an affidavit to a petition for an injunction to the effect that the petition was true "except as to such matters as are therein alleged to be upon information and belief," which matters were believed to be true, was insufficient to support an injunction because perjury could not have been assigned thereon.<sup>9</sup> While continued adherence to a highly technical rule which might prove to be a snare and a pitfall for unwary members of the bar would not be desirable, it is questionable whether a deviation therefrom should be tolerated in those situations, emergency or otherwise, where an affidavit is required by express mandate of the legislature.

INJUNCTIONS — PRELIMINARY AND INTERLOCUTORY INJUNCTIONS — WHETHER OR NOT FAILURE OF CORPORATION TO JOIN WITH ITS DIRECTORS IN SUCCESSFUL APPEAL TO DISSOLVE TEMPORARY INJUNCTION BARS CORPORATION FROM RECOVERY OF DAMAGES—The Appellate Court for the First District in the case of *Kolin v. Leitch*,<sup>1</sup> was recently asked to determine whether a corporate party which had not joined in an appeal to dissolve an interlocutory temporary injunction could offer a suggestion for damages arising from the improper issuance thereof. The case was one in which

<sup>5</sup> 332 Ill. 500, 163 N. E. 792 (1928).

<sup>6</sup> 363 Ill. 66, 1 N. E. (2d) 213 (1936).

<sup>7</sup> There would seem to be tacit recognition given therein to the holding in *Will v. City of Zion*, 225 Ill. App. 179 (1922), to the effect that a bill of complaint should be verified as to its material parts, thereby distinguishing positive allegations from those stated on information and belief.

<sup>8</sup> 268 Ill. App. 478 (1932).

<sup>9</sup> See also *Fox v. Fox Valley Trotting Club, Inc.*, 349 Ill. App. 132, 110 N. E. (2d) 84 (1953), where it was indicated that the rule as to verification of pleadings for injunctions would be applied to requests for the appointment of temporary receivers. The affidavit there concerned contained an exception "with respect to the allegations which are on information and belief."

<sup>1</sup> 351 Ill. App. 66, 113 N. E. (2d) 806 (1953). For earlier aspects of the case, see 343 Ill. App. 622, 99 N. E. (2d) 685 (1951).

the plaintiff originally sought to enjoin the board of directors of a private school corporation from closing its doors. After temporary injunction had been issued against the members of the board, and their motion to dissolve the same had been denied, the school corporation was added as a party defendant. On interlocutory appeal,<sup>2</sup> the board of directors secured reversal of the temporary injunction. The school corporation, which had not been a party to the motion to dissolve or to the appeal from the denial thereof, thereupon filed a written suggestion of damages,<sup>3</sup> claiming to be the party damnified. Plaintiff opposed the suggestion on the ground the corporation as such, had not sought dissolution of the temporary injunction, but the trial court nevertheless assessed damages in favor of the school. On appeal therefrom, the Appellate Court affirmed, holding that the corporation was the person damnified by the issuance of the injunction, and the failure to include it as an appellant in the appeal taken by its board of directors did not operate to bar relief.

While the case is not the first in which a party not enjoined has been held entitled to recover damages under a statutory suggestion with respect thereto,<sup>4</sup> the earlier cases were ones in which the damnified party had joined in the motion to dissolve the injunction and had, thereby, laid the predicate for a claim for damages. In contrast thereto, it was held, in *Ridgley v. Minneapolis Threshing Machine Company*,<sup>5</sup> that a party who did not join in a motion to dissolve would not be entitled to seek summary damages but would be left to recover them, if at all, in a separate action on the injunction bond.<sup>6</sup> The apparently contradictory result attained in the instant case, one in which the corporation had not been directly enjoined nor had participated in the motion to dissolve, seems to have turned on the fact that the corporation was said to be represented by its directors who, in their management of the corporation,<sup>7</sup> were supposed, in their representative capacity, to be acting in its behalf. The case, then, would seem to create an exception to the general rule previously followed. In that connection, it should be noted that the representative capacity in which the directors acted played an important part in the decision, so it is unlikely that this exception will again be extended to cover cases wherein one defendant, not so represented, and who has not joined in a motion to dissolve, will have the benefit of action taken by a co-defendant. Such a person will, in all probability, be left to his remedy in a suit on the injunction bond.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 202.

<sup>3</sup> *Ibid.*, Vol. 1, Ch. 69, § 12.

<sup>4</sup> See *Hunt v. Pronger*, 126 Ill. App. 403 (1906), wherein the motion to dissolve was granted by the trial court, and *School Directors of Dist. No. 181 v. Mathis*, 168 Ill. App. 174 (1912).

<sup>5</sup> 61 Ill. App. 173 (1895). See also *Leonard v. Pearce*, 271 Ill. App. 428 (1933).

<sup>6</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 69, § 12, indicates that a failure to assess damages shall not operate to bar an action on the bond given pursuant to Section 9 thereof.

<sup>7</sup> *Ibid.*, Vol. 1, Ch. 32, § 157.33.

**MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—WHETHER OR NOT EMPLOYEE, INJURED WHILE VIOLATING FEDERAL CRIMINAL STATUTE, MAY MAINTAIN ACTION FOR INJURY AGAINST EMPLOYER**—An interesting question was presented to the Appellate Court for the First District through the case of *Bonnier v. Chicago, Burlington & Quincy Railroad Company*.<sup>1</sup> The plaintiff there involved was jarred, during switching operations, from his position atop a standing gondola car consigned to an out-of-state consignee. Plaintiff, employed as a yard blacksmith by the defendant carrier, was then in the process of removing a piece of scrap metal from the consigned shipment without authority or direction from the employer and, apparently, was acting in violation of a federal statute making it unlawful to take, possess, or carry away any article moving in interstate commerce.<sup>2</sup> In plaintiff's suit to recover for personal injuries so sustained, the trial court overruled defendant's motion for a directed verdict and for judgment notwithstanding the verdict and entered judgment for the plaintiff. On appeal therefrom, the Appellate Court reversed the judgment, with direction to enter judgment in favor of the defendant, on the ground that plaintiff's unlawful act in going upon the car and taking property belonging to a third person justified the dismissal of his action.

The law is well settled that courts will not enforce a civil cause of action founded, in whole or in part, upon the doing of an act which is against public policy or in violation of law.<sup>3</sup> On the basis of this doctrine, it has been held that a contract is unenforceable if any part of, or the whole of, the consideration is illegal<sup>4</sup> or if plaintiff's own unlawful act has concurred with that of the defendant in causing the injury of which he complains.<sup>5</sup> For that matter, where the plaintiff is himself guilty of the violation of a penal statute, he has been denied the right to recover from the defendant for harm caused by the same, or a similar, violation.<sup>6</sup> It would seem, therefore, that any extension of these previous decisions to a case in which the plaintiff alone was acting in violation of law at the time of his injury should occasion no great surprise.

It is interesting to note, however, that the court emphasized the fact that the result in question was reached without taking into consideration the defendant's conduct and its participation, or the absence thereof, in the harm inflicted on plaintiff.<sup>7</sup> Carried to its logical conclusion, the case

<sup>1</sup> 351 Ill. App. 34, 113 N. E. (2d) 615 (1953).

<sup>2</sup> See 18 U. S. C. A. § 659.

<sup>3</sup> *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84 (1902).

<sup>4</sup> *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466, 51 N. E. 552 (1898).

<sup>5</sup> *Newton v. The Illinois Coal Co.*, 316 Ill. 416, 147 N. E. 465 (1925).

<sup>6</sup> *Harris v. Hatfield*, 71 Ill. 298 (1874).

<sup>7</sup> The case would indicate the presence of serious injury. At the first trial thereof, a verdict fixed plaintiff's damages at \$183,333.33. On new trial, a verdict of \$70,000 was reached and judgment was rendered thereon. The record does tend to show, however, an absence of negligence on the part of the employer.

would seem to support the view that, whenever a plaintiff is engaging in unlawful conduct, no matter how minor in character or remote in operative effect, the defendant is to be absolved from liability without any attention being given to the gravity of the defendant's wrong. It is easy to say that two wrongs should never make one right, but the humane spirit which conceived the doctrine of comparative negligence<sup>8</sup> most certainly would revolt before accepting a conclusion that drastic.

**WITNESSES—COMPETENCY—WHETHER OR NOT ESTATE WAIVES OBJECTION TO ADVERSE CLAIMANT'S COMPETENCY BY TAKING CLAIMANT'S PRE-TRIAL DISCOVERY DEPOSITION**—The claimant involved in the recent case of *Pink v. Dempsey*<sup>1</sup> presented a claim against an estate based on an oral contract with the deceased under which it was alleged that the deceased had promised to leave a will giving claimant all of his property in return for certain personal services which, claimant alleged, she had performed. Having failed to establish her claim in the probate court, claimant then appealed to a court of general jurisdiction where statutory trial *de novo* was granted.<sup>2</sup> Prior to a hearing before that court, the legal representative of the estate took claimant's pre-trial discovery deposition regarding all phases of her claim,<sup>3</sup> but this deposition was neither filed nor placed in evidence at the trial. At the ensuing trial, claimant was held to be disqualified as a witness,<sup>4</sup> despite claimant's contention that the right to object to her testimony had been waived by the taking of her pre-trial discovery deposition, and judgment was entered on the verdict against her. Upon appeal therefrom, the Appellate Court for the First District affirmed the decision, holding that the estate had not waived the disqualification of claimant as a witness by taking her pre-trial discovery deposition.

Although the precise problem involved in the instant case had not previously been passed upon in Illinois, some cases regarding the subject of examination and competency of witnesses<sup>5</sup> had arisen in connection with the operation of Section 60 of the Civil Practice Act.<sup>6</sup> These cases, interpreting the phrase "called as a witness" to refer to the direct eliciting of testimony at the trial of a cause, may be said to have laid the foundation for the present decision. Noting that the taking of a claimant's

<sup>8</sup> See Turk, "Comparative Negligence on the March," 28 CHICAGO-KENT LAW REVIEW 189 (1950).

<sup>1</sup> 350 Ill. App. 405, 113 N. E. (2d) 334 (1953). Leave to appeal has been denied.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, §§ 484 and 487.

<sup>3</sup> *Ibid.*, Vol. 2, Ch. 110, § 182(2), provides for pre-trial discovery by deposition. See also Rule 19 of the Illinois Supreme Court.

<sup>4</sup> *Ibid.*, Vol. 1, Ch. 51, § 2, preserves the familiar "dead man" rule as to qualification of adverse parties.

<sup>5</sup> *Smith v. Billings*, 177 Ill. 446, 53 N. E. 81 (1899); *Winger v. Chicago City Bank & Trust Co.*, 325 Ill. App. 459, 60 N. E. (2d) 560 (1945); *Chapman v. Bruton, Inc.*, 325 Ill. App. 334, 60 N. E. (2d) 125 (1945), *abst. opinion*.

<sup>6</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 184, authorizes the calling of any party as a witness, at the instance of the other party, upon the trial of any cause.

deposition would not amount to the same thing as a taking of testimony from a witness appearing at the trial of a cause, for the deposition would not become evidence until presented as such at the ensuing trial, the court concluded that no waiver of the disqualification had occurred by the mere act of securing pre-trial discovery. In that connection, it preferred the view that the waiver would not come into existence until some testimonial benefit was obtained at the trial in preference to the view, noted elsewhere, that a waiver of objection to competency, if made at one stage of a case, operates as a waiver with respect to all later stages.<sup>7</sup> As the primary purpose of pre-trial discovery appears to be one designed to encourage exploration of the opponent's claims and to avoid surprise, any other holding would place a barrier in the way of a full utilization of reformed procedural methods.

<sup>7</sup> See *McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454 (1922); *Barrett v. Cady*, 78 N. H. 60, 96 A. 325 (1915).